Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

BASE METAL TRADING, LIMITED,

Petitioner,

v.

OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Shaffer v. Heitner*, 433 U.S. 186 (1977), this Court held:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

Id. at 210, n. 36.

Contrary to the holding of *Shaffer*, and decisions by the Ninth Circuit and the Southern District of New York directly on point, the Court of Appeals below affirmed dismissal of an action to confirm and enforce a foreign arbitration award, pursuant to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, *et seq.* for lack of personal jurisdiction, despite the district court's arrest of property of the defendant-debtor within the district. Thus, the following important question is raised:

Did the lower court err in dismissing an action to confirm and enforce a foreign arbitration award pursuant to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards when property of the debtor had been arrested in the district, in light of *Shaffer v. Heitner*, which held that it would not be unfair to allow an action to realize on a debt if property of the debtor was present in the jurisdiction?

LIST OF PARTIES

Petitioner Base Metal Trading, Ltd. is a Guernsey, Channel Islands, corporation engaged in trading associated with the aluminum industry. Respondent OOO "Novukuznetsky Aluminum Factory ("NKAZ"), is a Russian open joint stock corporation engaged in the manufacture and sale of aluminum. MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd. (collectively "MG Metal") intervened in the action below by filing a motion to vacate an attachment order, alleging it owned the aluminum arrested in the action.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14(1)(b) and 29.6, Petitioner Base Metal Trading, Ltd. makes the following disclosure:

1. Petitioner is not a publicly held corporation or other publicly held entity.

2. Petitioner has no corporate parent.

3. None of Petitioner's stock is held by a publicly traded corporation or other publicly held entity.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Base Metal Trading, Ltd. ("Base Metal") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 6, 2002, which affirmed the district court's June 14, 2001 order denying Base Metal's motion for reconsideration of the district court's order of April 3, 2001 dismissing this action for lack of personal jurisdiction.

OPINIONS BELOW

The March 6, 2002 memorandum opinion of the United States Court of Appeals for the Fourth Circuit that gives rise to this Petition is reported at 283 F.3d 208. It is reprinted in Appendix A hereto ("App. A") at page 1a. The district court's judgment order dated April 3, 2001 which dismissed this case for lack of jurisdiction (the "Dismissal Order") (reproduced at App. C, 18a); memorandum and order dated April 3, 2001 (reproduced at App. D, 20a); and memorandum and order dated June 14, 2001 denying Petitioner Base Metal's motion for reconsideration of the Dismissal Order (reproduced at App. B, 13a) have not been published and are attached hereto.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1). The United States Court of Appeals for the Fourth Circuit issued its Decision by way of an opinion dated March 6, 2002, and judgment was entered on that date. Pursuant to Supreme Court Rule 13.1, this Petition was filed

within 90 days of the entry of the opinion and judgment, and is thus timely.

STATUTES AND RULES

The 1958 New York Convention on Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, *et seq.*

9. U.S.C. §§ 201 - 207 provide in relevant part:

> § 201. Enforcement of Convention
>
> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter [*9 USCS §§ 201* et seq.].
>
> § 203. Jurisdiction; amount in controversy
>
> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28 [28 U.S.C. § 460] shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.
>
> § 204. Venue
>
> An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title [9 U.S.C.S. § 203] may be brought in any such court in which save for the arbitration

agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration is such place is within the United States.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter [9 USCS §201, *et seq.*] for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferred recognition or enforcement of the award specified in the said Convention.

NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article III of the New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards provides:

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

> There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

STATEMENT OF THE CASE

In 1999, Base Metal and NKAZ submitted a dispute to the private Commercial Arbitration Court of the Moscow Chamber of Commerce and Industry, which awarded Base Metal approximately $13 million (the "award"). Subsequently, Base Metal learned that a shipment of 2,563 tons of aluminum (the "aluminum") owned by NKAZ was being shipped to Baltimore, Maryland.

On June 29, 2000, Base Metal filed a Verified Complaint to Confirm Foreign Arbitration Award, pursuant to 9 U.S.C. § 201, *et seq.* (the 1958 New York Convention on Enforcement of Foreign Arbitral Awards), in which Base Metal sought to confirm the award. Base Metal also filed a Motion under Fed.R.Civ.Pro. 64 seeking seizure or attachment of the aluminum (21a). Jurisdiction was based upon the existence of a federal question pursuant to 28 U.S.C. § 1331 and 9 U.S.C. § 203.

By order dated June 29, 2000, the Court granted the Rule 64 Motion and the aluminum was arrested (21a). Thereafter, Base Metal agreed to release the aluminum to a third party, MG Metal, which had filed a motion to vacate the attachment, so that it could be sold. Ownership of the proceeds was disputed and, if Base Metal ultimately prevails, it will have a claim over against MG Metal for the proceeds from the sale of the aluminum. Neither the June 29, 2000 arrest order, nor the

subsequent orders vacating the arrest order, are the subject of this Petition.

On August 15, 2000, Base Metal served the complaint, motion, and summons on NKAZ, pursuant to Fed.R.Civ.Pro. 4(f)(2)(A), via international express mail using DHL Worldwide Express. NKAZ failed to answer or otherwise respond within the required 90 days, and, on January 18, 2001, Base Metal sought entry of a default judgment (22a). The Clerk of Court entered default and a default judgment in the amount of $13,167,541.51 against NKAZ on January 26, 2001 (the "Default Judgment") (22a).

On February 14, 2001, NKAZ filed a motion seeking to vacate the Default Judgment, asserting that service had not been properly effected upon it, and, on April 3, 2001, the district court, without deciding the service of process issue, vacated the Default Judgment and dismissed the case *sua sponte* for lack of personal jurisdiction (the "Dismissal Order") (27a - 28a). Assuming that the aluminum was the property of NKAZ when arrested, the district court found:

> At most, the hypothetical NKAZ shipment of its metal and sale in Maryland would permit specific jurisdiction over NKAZ over a lawsuit relating to the shipment. By no stretch could the single shipment, or even several such shipments, constitute continuous and systematic contacts with Maryland so as to justify general jurisdiction over NKAZ.

(27a).

Base Metal filed a Motion for Reconsideration, on April 17, 2001, arguing: (1) that dismissal was inappropriate because NKAZ had not moved for dismissal of the claim; (2) that discovery should have been afforded on jurisdictional issues before the case was dismissed; and (3) the district court should have considered contacts between NKAZ and states other than Maryland under the terms of Fed.R.Civ.Pro. 4(k)(2).

The district court addressed only the Rule 4(k)(2) argument in its June 14, 2001 Memorandum and Order (the "Denial Order"), and denied the Motion for Reconsideration on two grounds: (1) that it was premature to make a finding that no state had jurisdiction over NKAZ while similar actions based on the arrest of aluminum were still pending in Louisiana and New Jersey (15a - 16a); and (2) that Base Metal's assertion in other actions that NKAZ was subject to jurisdiction in Louisiana and New Jersey meant that Base Metal had not and could not assert, as required by Fed.R.Civ.Pro. 4(k)(2), that NKAZ was not subject to jurisdiction anywhere in the United States (16a).

Base Metal filed a timely notice of appeal of the Denial Order on July 13, 2001. On March 6, 2002, the Court of Appeals for the Fourth Circuit affirmed the Denial Order, again assuming that the aluminum was the property of NKAZ (8a, 10a).

REASONS FOR GRANTING THE WRIT

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *SHAFFER V. HEITNER* THAT THE PRESENCE OF PROPERTY IN A STATE IS SUFFICIENT TO CONFER JURISDICTION TO REALIZE ON AN ADJUDICATED DEBT AND A NINTH CIRCUIT DECISION WHICH SPECIFICALLY HOLDS THAT THE PRESENCE OF PROPERTY IN A STATE IS SUFFICIENT TO CONFER JURISDICTION TO CONFIRM AND ENFORCE A FOREIGN ARBITRATION AWARD UNDER THE NEW YORK CONVENTION

The issue presented in this Petition goes to the heart of international commerce: whether courts in the United States can maintain jurisdiction in a manner consistent with sister courts around the world[1], pursuant to the 1958 New York Convention on Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. § 201, *et seq.*, to enforce foreign arbitral awards when property is present in the United States.

Contrary to this Court's holding in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Fourth Circuit held that presence of

[1] For example, the courts of England allow "direct enforcement" of foreign arbitration awards upon presentation of certified originals, insofar as they can serve as the basis for domestic collection proceedings as if they were domestic judgments. *See generally* Volz & Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 Wm. Mitchell L. Rev. 867, 871 & n.12 (1996) and sources cited therein. Most Western European nations enforce foreign arbitration awards under the Convention as if they were domestic judgments, subject to limited judicial review in summary proceedings. *Id.* at 894. Belgium allows such proceedings to occur *ex parte*. *Id.* at 895.

property was not sufficient to confer jurisdiction to confirm and enforce an arbitration award against a foreign debtor. The Fourth Circuit's decision also directly conflicts with a recent decision of the Ninth Circuit, *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), holding that the presence of property is sufficient to confer jurisdiction to confirm and enforce an arbitration award under the Convention.

In *Shaffer*, this Court recognized that a state may assert jurisdiction over property despite the absence of "minimum contacts" with its owner, if the attachment is accomplished for purposes of providing security (or satisfaction) for a prior or pending *in personam* action against the owner elsewhere, consistent with the requirements of *International Shoe v. State of Washington*, 326 U.S. 310 (1945). Justice Marshall, who penned the majority opinion, explained that:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

Id. at 210, footnote 36.

This Court explained its reasoning as follows:

> The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not

have jurisdiction if *International Shoe* applies is that a wrongdoer

> "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit." Restatement [(Second) of Conflict of Laws] §66, Comment a.I.
>
> Accord, [Note, Developments in the Law, State-Court Jurisdiction, *73 Harv. L. Rev. 955 (1960*] ... Moreover, we know of nothing to justify the assumption that a debtor can avoid his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him.

Id. at 210.

Shortly after the Fourth Circuit rendered its decision in this matter, the Ninth Circuit reached the opposite result in *Glencore Grain* and held that, pursuant to *Shaffer*, a foreign arbitration award under the Convention is the equivalent of a judgment, so that jurisdiction to confirm such an award may be asserted based on a non-resident debtor's property in the jurisdiction. 284 F.3d at 1127. The Ninth Circuit explained:

> Glencore Grain asserts: "Proceedings to enforce a foreign arbitration award against assets located in this jurisdiction should not require the same showing of personal jurisdiction to satisfy due process as would a complaint seeking determination of the merits of the controversy, because the merits have already been determined." . . .

> Considerable authority supports Glencore Grain's position that it can enforce the award against Shivnath Rai's property in the forum even if that property has no relationship to the underlying controversy between the parties. In *Shaffer v. Heitner, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977)*, the Supreme Court endorsed the position urged by Glencore Grain ... *Shaffer, 433 U.S. at 210 n. 36;* see also Restatement (Third) of Foreign Relations Law § 487 reporter's note 7 (1987) ("The [] Convention does not refer to the subject, but it is clear that attachment and comparable provisional remedies for enforcement of a foreign arbitral award, if available in the enforcing state, are compatible with the Convention."); cf. *Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1049 (N.D. Cal. 1977)* (holding plaintiff may attach defendant's California property as security pending arbitration between the parties in New York).

Glencore Grain, 284 F.3d at 1127 (footnote and previously quoted language from *Shaffer* omitted). The Ninth Circuit found further support in this Court's pro-enforcement characterization of the Convention:

> The Convention and its implementing legislation have a pro-enforcement bias, a policy long-recognized by the Supreme Court:
>
> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial

> arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Glencore Grain, 284 F.3d at 1120 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

A second court has relied on *Shaffer* to assert jurisdiction to confirm and enforce a foreign arbitral award based on property within the district. In *CME Media Enters. B. V. v. Zelezny*, 2001 U.S. Dist. LEXIS 13888 (S.D. N.Y. 2001), the court held, pursuant to *Shaffer*:

> A court has authority to adjudicate a case based on its power over either the defendant's person or the defendant's property. Quasi in rem jurisdiction is jurisdiction over designated property that results in a judgment affecting the interests of particular individuals in designated property. *R. F. Shaffer v. Heitner, 433 U.S. 186, 199 & n.17, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977)*. Quasi in rem jurisdiction is used primarily for two purposes: to secure a pre-existing claim in the designated property or to apply property of a defendant towards satisfaction of a judgment previously obtained against the defendant. Id. ...
>
> [Q]uasi in rem jurisdiction is used to attach property to collect a debt based on a claim already adjudicated in a forum where there was personal jurisdiction over the defendant. *Shaffer, 433 U.S. at 210 & n.36.* Cf. *O'Connor v. Lee-*

> *Hy Paving Corp., 579 F.2d 194, 198 (2d Cir. 1978).* ...

Id. at *8. The court found that due process concerns were satisfied:

> [This] Court has quasi in rem jurisdiction because respondent maintains property, specifically, the [Bank] Account, in this District. *Shaffer, 433 U.S. at 199.* Minimum contacts are not required because an arbitration panel with personal jurisdiction over Zelezny has already adjudicated CME's claims against Zelezny and determined that he is a debtor of CME; the purpose of the instant proceeding is to collect on that debt. See *id. at 210 n.36;* see also *Am. Constr. Mach. & Equip. Corp., Ltd. v. Mechanised Constr. of Pakistan Ltd., 1986 U.S. Dist. LEXIS 28551, No. 85 Civ. 3765, 1986 WL 2973,* at *5 (S.D.N.Y. March 5, 1986) (dicta, discussing *Shaffer* note 36).

Id. at *9 - 10. The court reviewed Justice Marshall's thorough analysis in *Shaffer* of the policies underlying *in rem* and *quasi in rem* jurisdiction and held, that: "[u]nder this reasoning, minimal contacts are not required for a court to exercise jurisdiction over assets to permit a party to collect on an arbitration award." *Zelezny*, 2001 U.S. District. LEXIS 13888 at *10.

In contrast, the Maryland district court and the Fourth Circuit did not appreciate the meaning of *Shaffer* and treated this matter as one requiring Base Metal to establish general jurisdiction over NKAZ. The court below incorrectly concluded that:

> [D]ue process requires Base Metal to establish that NKAZ's contacts with Maryland are "continuous and systematic" ... Yet, sufficient minimum contacts are simply not present in this case.
>
> Base Metal focuses on one shipment of aluminum to Maryland as a basis for jurisdiction .... Even assuming, however, that the aluminum did belong to NKAZ, this single shipment does not amount to "continuous and systematic" contacts.

(8a - 9a). As a result, Base Metal was put out of court.

Strong public policies support the exercise of jurisdiction to confirm and enforce foreign arbitral awards pursuant to the Convention when the debtor has property in the jurisdiction. As evidenced by the Act's legislative history, the underlying purpose of the Convention is to facilitate and encourage arbitration of international business disputes. The Convention provides for reciprocal recognition of arbitration awards among nations because: "[i]nternational trade is so important to our economy and to peace and welfare of the world". *In the matter of Fotochrome*, 377 F.Supp. 26, 32 (U.S. Bankr., S.D.N.Y. 1974) (citations omitted); *see also Glencore Grain*, 384 F.3d at 1120. International businesses provide for arbitration, rather than litigation, of commercial disputes because of concerns regarding costs and the fairness of proceedings in a foreign defendant's home jurisdiction. The Convention is intended to encourage and facilitate international arbitration and further America's trade interests. *See generally* Lanier, Invisible Barriers in United States Law to the Recognition and Enforcement of International Commercial Arbitration Agreements and Awards: The American Law of Personal Jurisdiction in Application to Judicial

Proceedings to Stay Litigation, to Compel Arbitration and to Confirm Arbitral Awards, 3 *Croat. Arbit. Yearb.* 140 (1996) (hereafter Lanier).

As noted by Lanier:

> The international community most concerned with the development of world trade and economic development has, over the course of the past four decades, done much to develop an interlocking, integrated and cohesive body of truly transnational principles in support of the effectiveness of international commercial arbitration as the method of choice in the resolution of international trade and commercial disputes.

Lanier, 3 *Croat. Arbit. Yearb.* at 155.

It would undermine the purposes of the Convention to prohibit confirmation of arbitration awards in jurisdictions where enforcement can be effected based on the presence of the foreign debtor's property. Allowing *quasi in rem* jurisdiction to be swallowed by the "minimum contacts" test, in the manner of the Fourth Circuit, would violate Justice Marshall's admonition that *Shaffer* should not be interpreted "to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him." *Shaffer*, 326 U.S. at 210; *Zelezny,* 2001 U.S. Dist. LEXIS 13888 at *10. Debtors could evade enforcement efforts by creditors with valid arbitration awards and, presumably, foreign judgments, by transferring their property to states with which they have few or no contacts. In the worst case, the United States could become a safe haven for sophisticated foreign debtors seeking to defraud their creditors.

Indeed, commentators have expressed fears that the United States is unable to fully support and abide by the requirements of the Convention because of the stringent application of "minimum contacts" jurisprudence. Lanier observes that:

> it is now time in the growing elaboration and maturation of the body of international and transnational principles which stand in support of international commercial arbitration and a reasoned, orderly, and rational system of international dispute settlement, to turn global attention to ... the lingering limitations of our internal legal orders which bear on the efficiency, effectiveness, and economy of international commercial arbitration. ... [T]he role of personal jurisdiction doctrine in American law as it bears on the recognition and enforcement of international commercial agreements and awards is offered as a modest beginning in that process ....

Id. at 155-56; *cf.* Strauss, Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments, 61 *Alb. L. Rev.* 1237, 1238 (1998) (recommending adoption of the proposed Hague Convention as a means of overcoming barriers to the satisfaction of foreign judgments caused by unique doctrines of American jurisdictional jurisprudence).

Confirmation of the proper reading of *Shaffer* by this Court will resolve a conflict between Circuits and encourage American courts to confirm and enforce awards obtained by foreign creditors in the manner of the *Glencore Grain* and

Zelezny decisions. This, in turn, will promote reciprocal exercises of jurisdiction by foreign courts to confirm and enforce awards obtained by American entities and thus further the interests of the United States, as reflected by its execution of the Convention. And, it will avoid the injustice of Base Metal being unable to satisfy its award, even though it diligently identified property of its former Russian trading partner in the United States.

CONCLUSION

For the foregoing reasons this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1916

[Filed March 6, 2002]

BASE METAL TRADING, LIMITED, Plaintiff-Appellant,	)
v.	)
OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," Defendant-Appellee,	)
MG METAL AND COMMODITY CORPORATION; MG METAL AND COMMODITY COMPANY, LIMITED, Movants.	)

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, District Judge
(CA-00-1973-MJG)

JUDGES:
Before WILKINSON, Chief Judge, and WILKINS and GREGORY, Circuit Judges. Chief Judge Wilkinson wrote the

opinion, in which Judge Wilkins and Judge Gregory joined.

OPINION

Plaintiff Base Metal Trading, Inc. ("Base Metal"), a Guernsey, Channel Island corporation brought the present action to confirm a foreign arbitration award against Defendant OJSC "Novokuznetsky Aluminum Factory" ("NKAZ"), a Russian corporation. The district court dismissed the case for lack of personal jurisdiction over NKAZ. Because the mere presence of seized property in Maryland provides no basis for asserting jurisdiction when there is no relationship between the property and the action, we affirm.

I.

From 1995 to 1999, plaintiff Base Metal, a Guernsey, Channel Islands corporation engaged in trading in raw materials associated with the aluminum industry, had various business dealings with defendant NKAZ, a Russian corporation engaged in the manufacture and sale of aluminum. A dispute arose between the two parties and in 1999, they agreed to arbitrate the dispute in the private Commercial Arbitration Court of the Moscow Chamber of Commerce and Industry. On December 10, 1999, the Commercial Arbitration Court issued an arbitration award in favor of Base Metal in the amount of approximately $12,000,000. However, Base Metal was unable to collect the award at that time.

On June 29, 2000, Base Metal filed a Verified Complaint to Confirm a Foreign Arbitration Award in

Maryland district court, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), implemented by 9 U.S.C. §§ 201 *et seq*. On that same day, Base Metal filed a motion seeking seizure or attachment of an aluminum shipment alleged to belong to NKAZ that had arrived in Baltimore Harbor on June 28. *See* Fed. R. Civ. P. 64. The attachment motion was granted by the district court and the property was taken into custody by the U.S. Marshal. Shortly thereafter, MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd. (collectively "MG") claimed ownership of the seized aluminum and moved to vacate the attachment. On July 7, 2000, the district court issued an order vacating the attachment, giving custody and control over the aluminum to MG, and providing for the placement into an escrow account of any funds derived from the sale of the aluminum.[1]

On September 7, 2000, Base Metal filed an affidavit stating that on August 15, 2000, a copy of the summons and complaint was sent to NKAZ. However, NKAZ did not respond.[2] On January 18, 2001, Base Metal moved for a default judgment against NKAZ. The district court granted the motion and entered a default judgment against NKAZ in the amount of $13,767,541.51. Upon learning of the default

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[1] Ultimately, Base Metal declined to pursue any claim against MG in the district court, so the present action involves only Base Metal and NKAZ.

[2] NKAZ also alleged that service was not proper. The district court, however, determined that the validity of the service was not necessary to its ruling.

judgment, NKAZ moved to vacate it and to have the case dismissed for, *inter alia*, lack of personal jurisdiction.

On April 3, 2001, the district court dismissed the case for lack of jurisdiction. The court noted that NKAZ's contacts with Maryland related exclusively to the fact that aluminum manufactured by NKAZ in Russia was unloaded in Baltimore Harbor. And the court held that, "By no stretch could the single shipment, or even several such shipments, constitute continuous and systematic contacts with Maryland so as to justify general jurisdiction over NKAZ."

Base Metal filed a motion for reconsideration seeking to have the court exercise jurisdiction pursuant to Rule 4(k)(2) of the Federal Rules of Civil Procedure which provides that a district court may exercise jurisdiction over a defendant if: (1) the plaintiff's claim "arises under federal law;" (2) the defendant "is not subject to the jurisdiction of the courts of general jurisdiction of any state;" and (3) the court's exercise of jurisdiction "is consistent with the Constitution and laws of the United States." Fed. R. Civ. P. 4(k)(2). The court determined that in order to exercise jurisdiction under Rule 4(k)(2) it had to find that no other state court had jurisdiction over NKAZ. And in light of cases pending in other courts in which Base Metal was arguing strenuously that NKAZ had sufficient contacts to warrant the exercise of personal jurisdiction, such a finding would be difficult and would usurp "the opportunity for sister federal courts to exercise jurisdiction which they may decide they have." Therefore, the court declined to apply Rule 4(k)(2). Base Metal appeals.

II.

Base Metal argues that the presence of NKAZ's property in Maryland confers jurisdiction over NKAZ for the purpose of confirming and enforcing the foreign arbitration award.

A.

As a preliminary matter, the Convention and its implementing legislation, 9 U.S.C. §§ 201 *et seq.*, give federal district courts original jurisdiction over actions to compel or confirm foreign arbitration awards. *See* 9 U.S.C. §§ 203, 207. However, while the Convention confers subject matter jurisdiction over actions brought pursuant to the Convention, it does not confer personal jurisdiction when it would not otherwise exist. In other words, a plaintiff still must demonstrate that personal jurisdiction is proper under the Constitution. *See Transatl. Bulk Shipping, Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985).

The personal jurisdiction inquiry is a well-established one. Determining whether jurisdiction is proper is normally a two-step process: (1) determining if the state's long-arm statute confers jurisdiction and (2) whether the exercise of jurisdiction, if authorized, is consistent with the Due Process requirements of the Fourteenth Amendment. Since Maryland's long-arm statute expands the exercise of personal jurisdiction to the limits allowed by the Due Process Clause, the two-step analysis merges in this case and the question is simply whether the exercise of personal jurisdiction would be consistent with due process. *See Ellicott Mach. Corp. v. John Holland Party Ltd.*, 995 F.2d 474, 477 (4th Cir. 1993);

Yangming Marine Transp. Co. v. Revon Prods. U.S.A, Inc., 311 Md. 496, 536 A.2d 633, 636 (Md. 1988). Due process requires only that a defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)). For these minimum contacts to exist, there must "be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).

In examining whether the exercise of jurisdiction is reasonable, a distinction is made between specific and general jurisdiction. When the cause of action arises out of the defendant's contacts with the forum, a court may seek to exercise specific jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984). However, when the cause of action does not arise out of the defendant's contacts with the forum, general jurisdiction may be exercised upon a showing that the defendant's contacts are of a "continuous and systematic" nature. *Id.* at 416; *see also Goodyear Tire & Rubber Co. v. Ruby*, 312 Md. 413, 540 A.2d 482, 486-87 (Md. 1988).

This basic analysis is not altered when the defendant's property is found in the forum state. The Supreme Court's

decision in *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977), eliminated all doubt that the minimum contacts standard in *International Shoe* governs *in rem* and *quasi in rem* actions as well as *in personam* actions. *Shaffer*, 433 U.S. at 207-12. The Court held that "in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing." *Id.* at 207 (internal quotations omitted). And "the standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*." *Id.*

Of course, the presence of property in a state may have an impact on the personal jurisdiction inquiry. Indeed, "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction." *Id.* Yet, when the property which serves as the basis for jurisdiction is completely unrelated to the plaintiff's cause of action, the presence of property alone will not support jurisdiction. 433 U.S. at 209. While, "the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation," when those "other ties" do not exist, jurisdiction is not reasonable. *Id.*

Overall, courts "must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief" when determining whether the exercise of jurisdiction is reasonable in any given case. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 94

L. Ed. 2d 92, 107 S. Ct. 1026 (1987). And "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." 480 U.S. at 114. But, "when minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Id.* We must, therefore, examine whether Base Metal has alleged significant minimum contacts between NKAZ and Maryland to justify the exercise of jurisdiction on the Russian corporation in this case.

B.

Base Metal contends that Maryland has jurisdiction to confirm the foreign arbitration award in large part because 2,563 tons of aluminum, alleged to be the property of NKAZ, arrived in Baltimore Harbor. Because Base Metal does not contend that this action arises out of NKAZ's alleged contacts with Maryland, there is no assertion of specific jurisdiction. Base Metal only alleges that the district court has general jurisdiction over NKAZ. Therefore, due process requires Base Metal to establish that NKAZ's contacts with Maryland are "continuous and systematic." *See Helicopteros*, 466 U.S. at 416. Yet, sufficient minimum contacts are simply not present in this case.

Base Metal focuses on one shipment of aluminum to Maryland as a basis for jurisdiction, but it is not clear that the aluminum in question belonged to NKAZ. Even assuming, however, that the aluminum did belong to NKAZ, this single shipment does not amount to "continuous and systematic"

contacts. There is no dispute that the aluminum bears no relationship to the arbitration award Base Metal seeks to confirm. And Base Metal has failed to show that NKAZ has "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253.

Indeed, the evidence fails to demonstrate NKAZ even attempted to do business in Maryland at all. NKAZ is a Russian corporation with its principal place of business in Novokuznetsk, Kemerevo Oblast, Russia. The evidence shows that NKAZ's business consists entirely of manufacturing aluminum in its Russian plant and it does not maintain an office of any kind outside of Russia. NKAZ does not contract directly with American companies or purchasers. It has no sales force or other agents in the United States. NKAZ has no subsidiaries, affiliates or shareholders in Maryland. Nor has it ever been authorized to do business in Maryland, transacted or solicited business in Maryland, or designated an agent to accept service of process in Maryland. NKAZ also neither owns nor rents any property in Maryland, has never conducted a financial transaction in Maryland, and has no assets of any kind in Maryland.

The mere fact that metal NKAZ manufactured in Russia was shipped to the United States does not amount to significant contacts with Maryland. Nor do vague references to possible contacts with New Jersey, "negotiations" with Kaiser Aluminum Company, "negotiations" in 1997 and 1998 in Pittsburgh concerning a possible joint venture with Alcoa, purchases of secondary aluminum from the United States in 1994 and 1995, other vague allegations of "negotiations" in the United States in 1998, and the attendance of NKAZ

representatives at trade conferences in the United States amount to systematic contacts with the United States, much less Maryland. Base Metal simply cannot support jurisdiction in Maryland by making vague, unsubstantiated claims based on the affidavit of a former NKAZ employee. Without establishing the minimum contacts required by *International Shoe* and *Shaffer*, the burdens the exercise of jurisdiction would place on NKAZ simply cannot be justified.

Furthermore, Base Metal has failed to demonstrate what, if any, interest Maryland has in the resolution of this dispute. NKAZ is not a Maryland corporation and does no business in Maryland. The dispute that led to the arbitration award has nothing to do with the United States or Maryland. And even more telling, Base Metal itself is not a Maryland corporation, nor is its principal place of business in Maryland or even in the United States. The fact that the plaintiff in this case is not a Maryland corporation or resident "considerably diminishes" Maryland's interest in the dispute. *Asahi Metal Industry Co.*, 480 U.S. at 114. While it is true that there is a general public policy interest in encouraging and enforcing arbitration agreements, that interest is not paramount to the interests protected by the Due Process Clause.

III.

As a final attempt to assert jurisdiction, Base Metal argues that jurisdiction is proper under Rule 4(k)(2) of the Federal Rules of Civil Procedure. Rule 4(k)(2) allows a federal court to assert jurisdiction in cases "arising under federal law" when the defendant is not subject to personal jurisdiction in any state court, but has contacts with the United States as a whole. A plaintiff who seeks to invoke

Rule 4(k)(2) as a basis for jurisdiction must show that (1) the claim "arises under federal law;" (2) the defendant is "not subject to the jurisdiction of the courts of general jurisdiction of any state;" and (3) the court's exercise of jurisdiction would be "consistent with the Constitution and laws of the United States." Fed. R. Civ. P. 4(k)(2).

Thus, for jurisdiction over NKAZ to be proper under Rule 4(k)(2), Base Metal must demonstrate that NKAZ is not subject to personal jurisdiction in any state and that NKAZ's contacts with the United States as a whole support the exercise of jurisdiction consistent with the Constitution and laws of the United States. *See United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41, 45 (1st Cir. 1999); Fed. R. Civ. P. 4(k)(2) advisory committee note. This Base Metal has failed to do. Base Metal has never attempted to argue that NKAZ is not subject to personal jurisdiction in any state. In fact, Base Metal continues to assert that personal jurisdiction over NKAZ is proper in Maryland as well as in other states. While, as the district court noted, "it is generally permissible for a litigant to present inconsistent alternate positions in a case," the problem here is that to determine that another state lacks jurisdiction would require us to decide a question currently pending before at least one of our sister circuits.

Even assuming that Base Metal could successfully argue that NKAZ is not subject to personal jurisdiction in any state, Base Metal has failed to proffer any evidence to demonstrate that NKAZ has sufficient contacts with the United States as a whole to justify general personal jurisdiction. Even when the allegations and declarations before the district court are credited, the contacts relied upon by Base Metal are insufficient. Base Metal's declarations and

allegations are simply unsubstantiated statements asserting that NKAZ is a major aluminum producer in Russia and has "extensive business contacts inside Russia as well as around the world including in the United States." Base Metal offers no concrete evidence of what these business transactions are. As we have explained, NKAZ's alleged contacts with the United States appear sparse and limited to a few shipments of aluminum arriving in American ports. It is not clear why the limited resources of the federal courts should be spent resolving disputes between two foreign corporations with little or no connection to our country. And the burdens of subjecting a foreign company to suit in this country in this case are not justified. Therefore, a finding of jurisdiction in this case would turn the notion of "fair play and substantial justice" on its head.[3]

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[3] Base Metal also contends that the district court abused its discretion by failing to permit jurisdictional discovery. However, the decision of whether or not to permit jurisdictional discovery is a matter committed to the sound discretion of the district court. *See, e.g., Cent. States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000); *Erdmann v. Preferred Research, Inc.*, 852 F.2d 788, 792 (4th Cir. 1988). And where, as here, the plaintiff simply wants to conduct a fishing expedition in the hopes of discovering some basis of jurisdiction, we see no reason to overturn the district court's exercise of discretion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-00-1973

[Filed June 14, 2001]

BASE METAL TRADING, LTD, Plaintiff	)
v.	)
OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," Defendant	)

MEMORANDUM AND ORDER

The Court has before it Plaintiff's Motion for Reconsideration and the materials submitted by the Plaintiff relating thereto. The Court finds that it is not necessary to hold a hearing to resolve the motion.

By its Memorandum and Order of April 3, 2001, the Court held that it lacked personal jurisdiction over Defendant OJSC "Novokuznetsky Aluminum Factory" ("NKAZ") and dismissed the case for lack of jurisdiction. By the instant motion, Plaintiff seeks to have this Court change its decision in reliance upon Federal Rule of Civil Procedure 4(k) (2) of

the Federal Rules of Civil Procedure. The said Rule provides that a district court may exercise jurisdiction over a defendant if:

1. The Plaintiff's claim arises under federal law,

2. The Defendant is beyond the reach of any state court of general jurisdiction, and

3. The Court's exercise of jurisdiction would not offend the Constitution or other federal law.

As stated by Judge Ramsey of this Court in *Weyerhaeuser Corp. v. Koppers Co., Inc.:*

> A motion for reconsideration (or, to alter or amend judgment) made pursuant to Fed. R. Civ. P. 59 (e) may be made for one of three reasons: (1) an intervening change in the controlling law has occurred, (2) evidence not previously available has become available, or (3) it is necessary to correct a clear error of law or prevent manifest injustice.

771 F. Supp. 1406, 1419 (D. Md. 1991) (citation omitted). Such a motion "cannot be used to raise arguments which could, and should, have been made before [the determination to be reconsidered] issued." *Fed. Deposit Ins. Corp. v. Meyer*, 781 F. 2d 1260, 1268 (7th Cir. 1986) (citation omitted).

Here, the threshold issue is whether Plaintiff may present its Rule 4 (k) (2) contention for the first time on reconsideration. Plaintiff argues that it may present its contention because it was not on express notice that the Court was considering dismissal for lack of personal jurisdiction. The Court will assume, without deciding, that Plaintiff may present this argument.

There is an insurmountable obstacle to *this* Court's application of Rule 4 (k) (2) in the instant case. The Court expressly refers to "*this* Court" because it may be possible for another court to consider applying the Rule. The problem is that Plaintiff is, so far as the record reflects, still contending in other cases that the District of New Jersey (considering New Jersey jurisdiction) and the Eastern District of Louisiana (considering Louisiana jurisdiction) can exercise personal jurisdiction over NKAZ.

The problem is not caused by the inherent inconsistency of the position that NKAZ is subject to personal jurisdiction in Maryland, New Jersey and/or Louisiana on the one hand and the position that it is not for Rule 4 (k) (2) purposes. After all, it is generally permissible for a litigant to present inconsistent alternate positions in a case. The difficulty here is that *this* Court must find the absence of Maryland, New Jersey and Louisiana jurisdiction in order to apply Rule 4 (k) (2). Insofar as Maryland is concerned, the alternative positions cause no problem because, in this very case, the issue of Maryland jurisdiction will definitively be determined. However, in regard to New Jersey and Louisiana jurisdiction, this Court would be deciding questions pending before two sister federal courts. Should this Court decide that

there is no New Jersey or Louisiana jurisdiction, and apply Rule 4 (k) (2), it would be usurping the opportunity for sister federal courts to exercise jurisdiction which they may decide they have. Should this Court decide that there is New Jersey and/or Louisiana jurisdiction and not apply Rule 4 (k) (2), the decision would, certainly, not bind the District of New Jersey and the Eastern District of Louisiana. Hence, those courts could decide differently from the District of Maryland and decline to exercise personal jurisdiction over NKAZ.

This Court finds it to be most sound for a plaintiff seeking application of Rule 4 (k) (2), definitively to plead, and establish, that a defendant is beyond the jurisdictional reach of any state court. The Plaintiff here has not, and cannot, meet this standard. Accordingly, this Court will not apply Rule 4 (k) (2).

Finally, the Court will observe that another court may have the opportunity to consider the application of Rule 4 (k) (2). For example, the matter may well be appropriate for consideration by the District of New Jersey[1] should Plaintiff either (1) concede there that neither Maryland nor Louisiana can exercise jurisdiction over NKAZ or (2) present the New Jersey court with decisions of the federal courts in Maryland and Louisiana so holding. Indeed, with the instant decision, Plaintiff has half of what it needs in this regard.

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[1] To the extent pertinent, it appears that New Jersey may be the state with which NKAZ has had the most contacts.

For the foregoing reasons:

1. Plaintiff's Motion for Reconsider is DENIED.

2. The Judgment Order issued by this Court on April 3, 2001 remains in effect.

SO ORDERED this 14th day of June, 2001.

/s/ _____
Marvin J. Garbis
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-00-1973

[Filed April 3, 2001]

BASE METAL TRADING, LTD, Plaintiff	)
v.	)
OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," Defendant	)

JUDGMENT ORDER

By separate Order issued this date, the Court has decided to dismiss this case for lack of jurisdiction.

Accordingly:

1. Judgment shall be, and hereby is, entered in favor of Defendant OJSC "Novokuznetsky Aluminum Factory" against Plaintiff Base Metal Trading, Ltd. dismissing all claims due to a lack of personal jurisdiction with costs.

2. Any and all prior rulings disposing of any claims against any parties are incorporated by reference herein.

3. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 3rd day of April, 2001

/s/ _____
Marvin J. Garbis
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-00-1973

[Filed April 3, 2001]

BASE METAL TRADING, LTD, Plaintiff	)
v.	)
OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," Defendant	)

MEMORANDUM AND ORDER

The Court had before it the Motion to Vacate Default Judgment filed by Defendant, OJSC "Novokuznetsky Aluminum Factory" ("NKAZ"), and the materials submitted relating thereto. The Court finds that a hearing is unnecessary.

I. BACKGROUND

During the years 1995 through 1999, Plaintiff, Base Metal Trading, Inc. ("Base Metal"), a metal dealer, and Defendant, NKAZ, a Russian corporate aluminum producer,

had various business dealings. A dispute arose which ended up with the December 10, 1999 issuance of a Russian arbitration award in favor of BMT and against NKAZ in the amount of approximately $12,000,000. Base Metal brought this action to confirm the foreign arbitration amount and, thus, for a Judgment against NKAZ for the amount of this award plus interest and expenses. This action was filed in the District of Maryland because a shipment of aluminum, alleged to be the property of NKAZ, was found in Maryland.

On or about June 28, 2000, a foreign vessel, M/V SALVADOR, carrying some 2,563 metric tons of aluminum docked in the Port of Baltimore. On June 29, 2000, Plaintiff, Base Metal, filed a Motion under Rule 64 of the Federal Rules of Civil Procedure seeking seizure or attachment of the aluminum that was alleged to be the property of Defendant NKAZ. The motion was granted and the property was taken into custody by the U.S. Marshal. Shortly thereafter, MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd. (collectively "MG") claimed ownership of the seized aluminum and moved to vacate the attachment. On July 7, 2000, the Court issued an Order vacating the attachment, giving MG custody and control of the aluminum, and providing for the placement into an escrow account of any funds derived from the sale of the aluminum. Thereafter, MG agreed to subject itself to the jurisdiction of this Court to the extent of the value of the seized metal and presented proof of financial condition making the escrow arrangement unnecessary. Hence, the escrow Order was vacated and, ultimately, Base Metal declined to pursue any claim against MG in this Court. Accordingly, the instant case now involves only Base Metal's claim against NKAZ.

On September 7, 2000, Base Metal filed an Affidavit of Service by its then counsel stating that on August 15, 2000, he had sent copies of the Summons and Complaint to NKAZ's factory by DHL Express Mail Courier, signature required. The attached Airwaybill reflected that the parcel had been addressed to NKAZ, "attention Sergei Chermnsko" and stated thereon "Delivered 8/21/00 at 11:50 a.m. Signed for by SERGEEVA." The Airwaybill did not have the "Sergeeva" signature on it.

NKAZ did not respond to the Summons and Complaint. On January 18, 2001, Base Metal moved for a default judgment against NKAZ. On January 26, 2001, this Court granted the motion and entered a default judgment against NKAZ in the amount of $13,767,541.51.

On February 14, 2001, NKAZ filed the instant Motion to Vacate Default. NKAZ seeks to have the Default Judgment vacated and the case dismissed because:

1. Base Metal has failed to effect proper service process, and

2. NKAZ is not subject to personal jurisdiction in this Court.

II. SERVICE OF PROCESS

NKAZ has raised serious questions regarding the validity of Base Metal's purported service of process. An adequate discussion of the service of process issues would require a lengthy, and in part complex, discussion. There are

"interesting" questions presented, such as the current status of the "Moscow Agreement [on service of process]" between the United States and the Soviet Union, various propositions of Russian law, the effect of the statement on an Airwaybill "signed for by SERGEEVA [block letters and not a signature]" when the parcel was sent to the attention of one Sergei Chermnsko etc. Nevertheless, the Court finds it unnecessary to discuss these service issues because the validity *vel non* of the purported service of process is immaterial.

In view of Base Metal's obvious good faith attempt to effect service, the Court would not dismiss the case were service held invalid, but would vacate the Default Judgment giving Base Metal another chance. On the other hand, were service held adequate, in view of the obvious existence of serious questions as to the validity of service and the relatively prompt action by NKAZ, the Court would vacate the Default Judgment giving NKAZ a chance to defend the case on the merits.

Accordingly, by virtue of the service of process issues, the Court will vacate the Default Judgment. It is now necessary to determine whether, in light of the jurisdictional issue, the case should be dismissed.

III. PERSONAL JURISDICTION

As discussed above, the Court will vacate the Default Judgment by virtue of the existence of serious issues as to the validity of service of process. It is, therefore, necessary to

determine whether the Court does, or may, have personal *jurisdiction over Defendant NKAZ.*

A. Legal Principles

The Court's determination of the exercise of personal jurisdiction over Defendant is a two-step process. First, the Court must determine whether the state's long-arm statute authorizes jurisdiction.[1] Second, the Court must determine whether the exercise of jurisdiction, if authorized by the statute, is consistent with the due process requirements of the Fourteenth Amendment. *See Mohamed v. Michael*, 279 Md. 653, 657 (1977). The Court must look to Maryland law to determine whether the long-arm statute confers jurisdiction and to federal law to determine whether the exercise of personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment. *See Snyder v. Hampton Indus., Inc.*,

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[1] Maryland's long-arm statute provides, in pertinent part:

(b) In general – A court may exercise personal jurisdiction over a person, who directly or by an agent:

(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the state;

. . . .

Md. Code Ann. Cts. & Jud. Proc. § 6-103 (1991).

521 F. Supp. 130, 135 (D. Md. 1981), *aff'd*, 758 F. 2d 649 (4th Cir. 1993). The normal two-step analysis merges into one and thus, this Court must examine whether the exercise of personal jurisdiction is consistent with due process. *See Ellicott Mach. Corp.*, 995 F. 2d at 477.

In order for the Court properly to exercise personal jurisdiction, the defendant must have certain minimum contacts with Maryland such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). (Internal quotations omitted). For these minimum contacts to exist, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). *See also Hanson v. Denckla*, 357 U.S. 235, 1259 (1958). In light of such contracts the court must consider factors such as the burden on the defendant, the plaintiff's interest in obtaining convenient and effective relief, the plaintiff's interest in obtaining convenient and effective relief, the forum state's interest adjudicating the dispute, and the interstate judicial system's interest in obtaining efficient resolution of controversies. *See Burger King Corp.*, 471 U.S. at 476-77.

A distinction must be drawn between specific jurisdiction and general jurisdiction. *See, e.g., Bass v. Energy Transp. Corp.*, 787 F. Supp. 530, 534 (D. Md. 1992). When a court seeks to exercise specific jurisdiction, the cause of action must arise out of defendant's minimum contacts with the forum. *See Helicopteros Nacionales de Colombia, S.A. v.*

Hall, 466 U.S. 408, 414 (1984). When the cause of action is unrelated to the defendant's contacts with the forum state, the court may exercise general jurisdiction upon a showing that the defendant's contacts are of a continuous and systematic nature. *See id.* at 416. The general jurisdiction threshold is higher than that required for specific jurisdiction. Under principles of general jurisdiction established pursuant to Maryland law, a defendant's contacts with Maryland "must be sufficiently extensive, continuous, and systematic in order to satisfy Maryland's (b) (4) statutory requirements of 'overall fairness.'" *Bass*, 787 F. Supp. at 535 (quoting *Goodyear Tire & Rubber Co. v. Ruby*, 540 A. 2d 482 (1988)). *See, e.g., Rossetti v. Esselte-Pendeflex*, 683 F. Supp. 532, 534 (D. Md. 1988) ("When jurisdiction is asserted over a claim which does not arise out of a defendant's contacts with the forum state, the defendant's contacts with that forum must be 'fairly extensive.'") (quoting *Wolf v. Richmond County Hosp. Auth.*, 745 F. 2d 904, 909 (4th Cir. 1984)). The court must examine the quality and nature of the defendant's activity in the forum state. The defendant must act in such a way that it "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Poole & Kent Co. v. Equilease Assocs. I*, 523 A. 2d 1018, 1024 (Md. Ct. Spec. App. 1987) (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The Fourth Circuit has commented that "[b]ecause specific jurisdiction has expanded tremendously, . . . [and] plaintiffs now may generally bring their claims in the forum in which they arose [,] . . . broad constructions of general jurisdiction should be generally disfavored." *Nichols v. G.D. Searle & Co.*, 991 F. 2d 1195, 1200 (4th Cir. 1993) (citations omitted).

B. Discussion

NKAZ's contacts with, and relation to, the State of Maryland stems from the fact that on or about June 28, 2000 some 2,563 metric tons of aluminum manufactured in Russia by NKAZ was unloaded in Baltimore Harbor. NKAZ is a Russian corporation with its principal place of business there and having no connection with Maryland.[2] Assuming, contrary to the apparent facts[3], that on June 28, 2000 the metal in Baltimore Harbor was owned by NKAZ and sold in Maryland by NKAZ, there would still be no adequate jurisdictional nexus.

At most, the hypothetical NKAZ shipment of its metal and sale in Maryland would permit specific jurisdiction over NKAZ over a lawsuit relating to the shipment. By no stretch could the single shipment, or even several such shipments, constitute continuous and systematic contacts with Maryland so as to justify general jurisdiction over NKAZ.

Base Metal seeks to engage in discovery regarding the transaction involving NKAZ manufactured aluminum. The Court finds such discovery unwarranted. As discussed above, even if the transaction at issue were characterized as Base

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[2] If, as Base Metal contends, NKAZ had significant contacts with New Jersey, this "fact" would not establish any material contact with Maryland.

[3] If the metal had been owned by NKAZ and not MG, Base Metal would have had a potential claim against MG. Yet, Base Metal has declined to assert any such claim.

Metal wishes, there would not be a basis to exercise general personal jurisdiction over NKAZ. The subject matter of the instant lawsuit has nothing to do with any shipment into Maryland or any connection with Maryland. Accordingly, this case shall be dismissed for lack of personal jurisdiction over the Defendant.

IV. CONCLUSION

For the foregoing reasons:

1. The Motion to Vacate Default Judgment is GRANTED.

2. The Order Granting Default Judgment issued January 25, 2001 has been VACATED by separate Order.

3. Judgment shall be entered by separate Order.

SO ORDERED this 3rd day of April, 2001.

/s/ _____
Marvin J. Garbis
United States District Judge